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Attorneys for Defendants  
**BRENDAN K. OZANNE; BRIAN C. DAWSON;**  
**and DAWSON & OZANNE**

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

O'M AND ASSOCIATES, LLC, an Illinois  
limited liability company d/b/a O'Malley &  
Associates; PRESERVE CAPITAL, LLC, an  
Illinois limited liability company; and MBM  
SETTLEMENTS, LLC, an Illinois limited  
liability company,

Plaintiffs,

v.

BRENDAN K. OZANNE; BRIAN C.  
DAWSON; and DAWSON & OZANNE, a  
California general partnership, as escrow  
agent; MATTHEW STOEN, individually  
and as manager and agent for KODIAK  
FAMILY LLC, a Nevada limited liability  
company; KODIAK FAMILY LLC  
individually and as agent for XYZ  
CORPORATION,

Defendants.

Case No. 10-cv-2130AJB (RBB)

**DEFENDANTS BRENDAN K. OZANNE,  
BRIAN C. DAWSON, AND DAWSON &  
OZANNE'S NOTICE OF MOTION AND  
MOTION TO DISMISS PURSUANT TO  
FRCP 12(B)(6)**

**Date: June 3, 2011**  
**Time: 1:30 p.m.**

Courtroom: 13  
Judge: Hon. Anthony J. Battaglia

Filed: October 13, 2010  
Trial Date: None Set

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**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**NOTICE IS HEREBY GIVEN THAT on June 3, 2011 at 1:30 p.m. in Courtroom 13** of the above-referenced Court, Defendants BRENDAN K. OZANNE, BRIAN C. DAWSON and DAWSON & OZANNE (collectively, "Defendants"), hereby move pursuant to Federal Rule of Civil Procedure 9(b) and 12(b)(6) to dismiss Counts II, III, IV, V, VII, VIII, and X with respect to various parties, in Plaintiffs O'M AND ASSOCIATES, LLC ("O'M"), PRESERVE CAPITAL, LLC, and MBM SETTLEMENTS, LLC ("MBM" collectively, "Plaintiffs") First Amended Complaint ("FAC") (the "Motion"). The Motion is made on the following grounds, as more fully set forth in Defendants' supporting memorandum (filed and served concurrently), on April 29, 2011 in the above-captioned court.

1. Dismissal of all counts as to Plaintiffs MBM and O'M because both parties lack standing to assert a claim or seek relief in this action. Neither entity was a party to the alleged contract at issue and had no ownership or possessory right to the funds at issue. Moreover, MBM was not even in existence at the time of the events giving rise to the claims set forth in the FAC.

2. Dismissal of the conversion count (Count III) as to all Plaintiffs because Plaintiffs have not and cannot plead the necessary elements of their conversion claim and cannot satisfy the heightened pleading standard of Rule 9(b), which is required because their action is grounded in fraud.

3. Dismissal of the unjust enrichment count (Count IV) as to all Plaintiffs because it is not a separate claim, but is instead an equitable remedy. Additionally, the count is unnecessary and duplicative and dismissal will not preclude or hinder Plaintiffs' ability to recover on the theory because any alleged unjust enrichment can still be shown in connection with Plaintiffs' substantive claims

4. Dismissal of the declaratory judgment count (Count V) as to all Plaintiffs because it is unnecessary and duplicative. The count does not provide any relief to Plaintiffs beyond the relief that they've already requested in their substantive claims.

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5. Dismissal of the breach of fiduciary duty counts (Counts II and VII) as to MBM and O'M because the parties have not and cannot plead the necessary elements of their claims. Specifically, they cannot establish the existence of fiduciary duties owed to them by Defendants arising from alleged contract because they were not parties to the contract. Because Defendants did not owe MBM or O'M any duty, by extension, these parties cannot establish any breach of duty or resulting damages.

6. Dismissal of the negligence interference with prospective economic advantage count (Count VIII) as to all Plaintiffs because Plaintiffs have not and cannot plead the necessary elements of their negligent interference count. Moreover, Preserve's claim is barred because the Preserve and Defendants were allegedly in contractual privity and a contracting party and its agents owe no duty to refrain from interfering with their own contract

7. Dismissal of the fraud count (Count X) as to all Plaintiffs because Plaintiffs have not and cannot plead the necessary elements of their claim with specificity and cannot satisfy the heightened pleading standard of Rule 9(b).

This motion will be based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Robert A. Ortiz, Esq., and Request for Judicial Notice, as well as the pleadings, records, and files herein, and any evidence or argument presented at the hearing on this motion.

**PETTIT KOHN INGRASSIA & LUTZ PC**

Dated: April 29, 2011

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